Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

No. 03-674

IN THE

Supreme Court of the United States

KEYSE G. JAMA,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Date: July 22, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether immigration officials may remove petitioner to his country of birth under 8 U.S.C. § 1231(b)(2)(E)(iv), where that country lacks a functioning central government that is able either to accept petitioner's return or to withhold acceptance.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Benitez v. Mata,* No. 03-7434 (U.S., dec. pending); *Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

must be afforded broad power to deport aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of a decision from the Ninth Circuit, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies and despite being subject to final orders of removal. *Amici* are filing an *amicus curiae* brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous alien felons outweigh whatever rights those criminal aliens may have to avoid removal to a country that lacks a functioning central government.

STATEMENT OF THE CASE

Petitioner Keyse G. Jama is a citizen of Somalia who arrived in this country in 1996 at age 17. During the three years he lived freely in American society, he proved to be an incorrigible criminal: court records from Hennepin County, Minnesota indicate that Jama was arrested on 12 separate occasions in Hennepin County during that three-year period, including at least four arrests for assault and one for robbery. Joint Appendix ("J.A.") 11, 18.

Jama was incarcerated as a result of an assault on June 15, 1999. Police reports indicate that three individuals were found by police on a street corner at 4:00 a.m. suffering from stab wounds that required hospitalization; all three identified Jama as their assailant. *Id.* at 14. Jama pleaded guilty to third degree assault and was given a suspended sentence of one year and a day in prison. *Id.* Conditions of his probation included that he avoid becoming intoxicated and that he serve a brief term in the

county jail. *Id.* at 15.[2] Shortly after completing the jail term, Jama was found to be intoxicated on October 21, 1999; his probation was revoked, and he was ordered to serve his prison sentence. *Id.* at 15-16. While in prison, Jama's poor disciplinary record resulted in his being required to serve his entire sentence. *Id.* at 18. He has remained in the custody of immigration authorities since his release from prison.

As a result of Jama's felony assault conviction, the Immigration and Naturalization Service (INS) initiated removal proceedings against him. At an August 2000 hearing, Jama conceded removability under the INA by virtue of having been convicted of "a crime involving moral turpitude." The Immigration Judge (IJ) denied Jama's applications for: (1) waiver of inadmissibility; (2) adjustment of status; (3) withholding of removal (because Jama had been convicted of "a particularly serious crime"); and (4) relief under the Convention Against Torture (because Jama failed to show that if returned to Somalia, he would be tortured by any governmental group or by a person acting in any official capacity). J.A. 1-25. The IJ ordered Jama removed to Somalia. *Id.* at 25. On May 9, 2001, the Board of Immigration Appeals affirmed that order "for the reasons set forth in [the IJ's] decision." *Id.* at 26-27.

After the INS initiated steps to remove Jama, he filed a petition for a writ of habeas corpus on June 28, 2001 in U.S. District Court for the District of Minnesota. Jama contended that the INS lacked statutory authority to remove him to Somalia because it had not established that Somalia (which lacks a functioning government) would accept his return. Adopting the report and recommendation of a magistrate judge, Pet. App. 21a-41a, the district judge granted the petition and

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[2] At his sentencing, Jama stated that he would prefer to be deported to Somalia in lieu of being sentenced to prison. *Id.* at 16.

ordered the INS not to remove Jama from the United States until the government of the country to which he was to be removed had agreed to accept him. *Id.* at 42a-55a.

The Eighth Circuit reversed, and remanded for entry of an order dismissing the petition. *Id.* at 1a-12a. The appeals court agreed with the district court that the federal courts had jurisdiction over the habeas corpus claim. It rejected the government's contention that jurisdiction was barred by 8 U.S.C. § 1252(g), which deprives courts of jurisdiction over claims arising from government efforts to "execute removal orders." The court explained that Jama was not objecting to the Attorney General's decision to execute the removal order, but to his "legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return." *Id.* at 3a.

Turning to the merits, the Eighth Circuit disagreed with the district court's conclusion that § 1231(b)(2) requires the INS to establish that Somalia will accept Jama's return prior to removing him to that country. *Id.* at 4a. The appeals court noted that § 1231(b)(2)(E) lists seven categories of countries to which an alien may be removed and that only the seventh category (§ 1231(b)(2)(E)(vii)) includes an explicit requirement that the government of the country in question "will accept the alien into the country." The court concluded that Congress's omission of a similar acceptance provision from clauses (I) through (vi) demonstrated that Congress did not intend to impose an acceptance requirement on removals carried out under any of those six clauses. *Id.* at 6a. The court added:

> Whether it is politically wise, efficient, or considerate of the United States to remove an alien without the prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province.

Id. Judge Bye dissented. *Id.* at 9a-12a. He argued that regardless of the actual language of § 1231(b)(2), an acceptance requirement should be read into all provisions of the statute because that is the way courts consistently had read the statute over the preceding 45 years. *Id.* at 9a.

SUMMARY OF ARGUMENT

The courts below properly exercised jurisdiction over Jama's habeas corpus petition. Nonetheless, the jurisdictional issue is not as clear-cut as the courts below made it out to be, and the courts of appeals are in disarray regarding when aliens subject to removal proceedings are entitled to invoke the district courts' habeas corpus jurisdiction. Accordingly, although the issue of jurisdiction was not raised by either party, *amici* respectfully request that the Court address the issue in its decision. In particular, the Court should make clear that habeas corpus is not available to aliens fighting removal if they are otherwise entitled to judicial review under 8 U.S.C. § 1252 in the courts of appeals.

Federal law does not prohibit immigration officials from removing an alien to his country of birth even where that country lacks a functioning central government that is able either to accept the alien's return or to withhold acceptance. Jama's argument to the contrary is inconsistent with the wording of the relevant statutes. All parties to this litigation recognize that, as a practical matter, the government cannot remove someone to a country whose government is bound and determined not to accept the person. Accordingly, the government generally will not attempt such removal. Nonetheless, the rationale underlying that policy is wholly absent when the only reason that a country has not accepted an alien's return is that it lacks a functioning central government capable of conveying acceptance.

Jama is correct that Somalia is a dangerous place. But the Immigration Judge considered Jama's safety-related claims and found them inadequate to justify withholding of removal under the Convention Against Torture. Jama did not seek review of that ruling; accordingly, Jama has no basis for asserting that his removal would offend any safety-related policies established by Congress.

ARGUMENT

I. THE FEDERAL COURTS PROPERLY ASSERTED JURISDICTION OVER JAMA'S HABEAS CORPUS PETITION

Amici agree with the ultimate conclusion -- of both the district court and the Eighth Circuit -- that Congress has authorized the federal courts to exercise jurisdiction over Jama's habeas corpus petition. We nonetheless disagree with the analyses employed by the lower courts in reaching that conclusion and believe that the question is far more complex than the courts below acknowledged.

Although the federal government, in its response to the certiorari petition, abandoned its previous challenge to federal court jurisdiction over Jama's claims, it is always appropriate for this Court *sua sponte* to raise the issue of its own jurisdiction. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (citations omitted). Particularly where, as here, the jurisdictional issue is unsettled and the lower courts appear to be confused regarding their jurisdiction over immigration matters, it would be entirely appropriate for the Court to address its jurisdiction before moving on to the merits of Jama's claims.

A. 8 U.S.C. § 1252(g) Deprives the Federal Courts of Jurisdiction over Jama's Challenge to the INS's Efforts to Execute the Removal Order

There was some degree of confusion in the courts below regarding the nature of Jama's claims. The district court focused on two separate events preceding Jama's habeas corpus petition: (1) the Board of Immigration Appeals's (BIA) May 9, 2001 affirmance of the IJ's order that Jama be removed from the United States to Somalia; and (2) the INS's May 25, 2001 notification to Jama that it intended to execute the removal order. According to the district court:

> Petitioner is not challenging the validity of his removal order nor is he challenging his current INS detention *per se.* Instead, petitioner is challenging the manner in which the INS plans to execute the removal order. More specifically, petitioner claims that the INS should not be allowed to physically transport him to Somalia and drop him there, unless and until some proper governmental authority in Somalia has agreed to accept him.

Pet. App. 45a.

To the extent that Jama is challenging anything *other* than the validity of the final order directing his removal to Somalia, the federal courts lack jurisdiction to hear the challenge. Specifically, any discrete challenge to the INS's efforts to "execute removal orders" against him is barred by 8 U.S.C. § 1252(g).[3] Indeed, that was the precise holding in *Reno v.*

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[3] 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any

(continued...)

American-Arab Anti-Discrimination Committee ["*AADC*"], 525 U.S. 471 (1999).

As *AADC* explained, § 1252(g) is a "zipper" clause that precludes judicial review of three discrete types of INS decisions or actions -- commencing proceedings, adjudicating cases, and executing removal orders -- *except* in accordance with the judicial review provisions of 8 U.S.C. § 1252. *AADC*, 525 U.S. at 482.[4] The point of § 1252(g) is not to place certain government actions beyond the scope of judicial review. Rather, the point is to channel any challenges to immigration enforcement actions into a single judicial proceeding, and thereby avoid repeated, piecemeal judicial appeals that could end up paralyzing enforcement efforts. *Id.* at 485.

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[3](...continued)

> other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this Act. (Emphasis added.)

[4] In general, § 1252 requires all such challenges to be filed in a federal appeals court within 30 days after entry of the final order of removal. *See* 8 U.S.C. § 1252(b). In addition to § 1252(g), § 1252 contains a second "zipper" clause, which states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceedings brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9).

AADC's application to this case is clear. Jama may *not* challenge the INS's legal determination (that he may be removed to a country that lacks a government capable of accepting his return) by challenging the INS's efforts to execute its removal order. Rather, § 1252(g) requires that any challenge to that legal determination be raised in connection with a challenge to the final order directing that he be removed to Somalia.

Even though the magistrate judge and the district judge understood the habeas corpus petition as a challenge to the INS's efforts to *execute* the removal order (rather than a challenge to the removal order itself), they both rejected the INS's § 1252(g) jurisdictional challenge. *See, e.g.*, Pet. App. 29a-30a ("In this case, as in *St. Cyr*, the statute at issue does not expressly purport to divest the federal district courts of habeas corpus jurisdiction. Section 1252(g) does not specifically mention habeas corpus review, and it should not be understood to eliminate such review merely by implication.") According to the district judge, "In light of *St. Cyr*, INS's principal argument -- that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation -- is a dead letter." *Id.* at 47a (quoting *Carranza v. INS*, 277 F.3d 65 (1st Cir. 2002)).

The magistrate judge's and district judge's conclusions were based on a misunderstanding of § 1252(g), *AADC*, and this Court's subsequent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved a resident alien facing a final removal order due to his felony conviction on drug dealing charges. His request for waiver of deportation was denied based on the Attorney General's determination that Congress had deprived him of discretionary authority to grant a waiver. The principal issue before this Court was whether the district court retained habeas corpus jurisdiction to consider St. Cyr's challenge to the deportation order: St. Cyr claimed that the Attorney General

still possessed waiver authority. The Court rejected the government's contention that Congress had intended to eliminate habeas corpus jurisdiction over St. Cyr's challenge. The Court noted that, for much of the last century, habeas corpus actions were the principal means by which aliens could test the legality of deportation orders. *St. Cyr*, 533 U.S. at 306. The Court also noted its "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id.* at 298. The Court ruled that none of the statutes adopted in 1996 and relied on by the federal government constituted a sufficiently clear statement of congressional intent to repeal habeas jurisdiction over St. Cyr's challenge to his deportation order. *Id.* at 308-314.

The district court's contention that *St. Cyr* has deprived *AADC* of any vitality is not well-founded. *AADC* did not address a government assertion (as in *St. Cyr*) that Congress had stripped the federal courts of jurisdiction to hear challenges to aspects of the removal proceedings; rather, *AADC* simply decided that certain types of challenges may not be raised piecemeal but instead must be raised in connection with a § 1252 challenge to a final order of removal. *St. Cyr* never suggested that an alien may evade the bar on piecemeal challenges by simply labeling his suit as a habeas corpus petition. To the contrary, *St. Cyr* cited *AADC* approvingly in connection with its discussion of the § 1252(b)(9) "zipper" clause. *St. Cyr*, 533 U.S. at 313 n.37 (citing *AADC* in support of its conclusion that § 1252(b)(9) was adopted for the purpose of requiring consolidated judicial review of numerous types of INS actions in a single court of appeals proceeding).

Accordingly, the district court erred in holding that it possessed habeas corpus jurisdiction to hear claims arising from actions to "execute removal orders." Such jurisdiction is precluded by both § 1252(g) and § 1252(b)(9). To hold

otherwise would be to permit Congress's efforts to streamline the immigration appeals process to be frustrated by seriatim habeas corpus filings. In this case, the final order of removal specified that Jama was to be removed to Somalia. Any challenge to the federal government's determination that it was empowered to send Jama to Somalia should be made in connection with a challenge to the final order of removal, not in connection with a challenge to later actions taken by the government to execute that order.

The Eighth Circuit similarly muddled the government's § 1252(g) challenge to jurisdiction. In rejecting the government's position, the appeals court said:

> Mr. Jama, however, is not objecting to an unfavorable discretionary decision or action to execute the removal order. . . . He challenges, rather, the Attorney General's construction of a statute; specifically, the Attorney General's legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return.

Pet. App. 3a. The appeals court's rejoinder misses the government's point. If one wishes to challenge one of the Attorney General's legal conclusions, one must do so in connection with a challenge to government action by which one has been adversely affected. If the government actions of which one complains are actions designed to "execute removal orders," then § 1252(g) provides that the proper means of challenging such actions is a consolidated § 1252 challenge to the final order of removal.

B. 8 U.S.C. § 1252(a)(2)(C) Does Not Preclude Habeas Corpus Jurisdiction Over Jama's Challenge to the Order that He Be Removed to Somalia

Jama's efforts to establish federal court jurisdiction over his petition is further complicated by 8 U.S.C. § 1252(a)(2)(C), a statutory provision adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 1252(a)(2)(C) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [one of several enumerated criminal offenses].

Because Jama's assault conviction is one of the enumerated crimes, § 1252(a)(2)(C) would appear on its face to bar *all* judicial review of the final order directing that he be removed to Somalia. However, *St. Cyr* held otherwise, in a case involving an alien removable for having been convicted of one of the enumerated criminal offenses. The Court explained that while § 1252(a)(2)(C) was sufficiently clear to eliminate jurisdiction over Hobbs Act review proceedings created by the INA, it did not "speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *St. Cyr,* 533 U.S. at 313. Pursuant to *St. Cyr,* the district court possessed jurisdiction to review the final order directing that Jama be removed to Somalia.[5]

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[5] As noted above, Jama apparently insisted in the district court that he was challenging the INS's efforts to *execute* the final removal order, not the order itself. But because, in the context of this case, the final removal order and the INS's efforts to execute the order occurred almost simultaneously, there is little practical significance to the (continued...)

St. Cyr did, however, impose important limitations on habeas corpus jurisdiction. Key to the Court's recognition of habeas jurisdiction over the claims of aliens being deported for criminal activity was its recognition of "the strong presumption in favor of judicial review." *Id.* at 298. In the absence of habeas jurisdiction, alien felons resisting removal would have been deprived of all judicial review of their constitutional and statutory claims. Conversely, *St. Cyr* recognized, Congress should not be assumed to have permitted aliens resisting removal to assert claims in the district court by means of habeas corpus petitions when it has created an adequate procedure for asserting those same claims in the court of appeals. Thus, for example, in explaining why § 1252(b)(9) -- one of § 1252 "zipper" clauses -- did not bar habeas corpus actions by alien felons, the Court said:

> [§ 1252(b)(9)'s] purpose is to consolidate "judicial review" of immigration proceedings into one action in the court of appeals, but it applies only "[w]ith respect to review of an order of removal under subsection (a)(1)." 8 U.S.C. § 1252(b) (1994 ed., Supp. V). Accordingly, this provision, by its terms, does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1) -- including orders against aliens who are removable by reason of having committed one or more criminal offenses. Subsection (b)(9) simply provides for the consolidation of issues to be brought in petitions for "[j]udicial review," which, as we note above, is a term historically distinct from habeas.

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[5](...continued)
nomenclature that Jama employed. By allowing Jama to proceed with his habeas corpus petition -- even a petition nominally targeted at Jama's efforts to execute a removal order -- the district court did not risk the type of piecemeal review that Congress was seeking to avoid when it adopted § 1252(g).

Id. at 313.

Aliens felons (such as Jama) are barred by § 1252(a)(2)(C) from seeking § 1252 review of their final removal orders and thus are permitted (per *St. Cyr*) to contest removal by filing a habeas petition. But, as *St. Cyr*'s discussion of § 1252(b)(9) indicates, those non-criminal aliens whose removal orders *are* "subject to judicial review under § 1252(a)(1)" are barred by § 1252(b)(9) from filing district court habeas petitions.

This distinction between criminal and non-criminal aliens is significant in the context of deportations to Somalia. The U.S. Court of Appeals for the Ninth Circuit has affirmed an injunction, on behalf of a nationwide class of Somalians living in the United States, barring removal of any aliens to Somalia for so long as Somalia lacks a functioning central government. *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). Included within the class certified by the district court are numerous Somalians who have not been convicted of felonies and thus are not barred from seeking judicial review of their removal orders under § 1252 in the courts of appeals. As *St. Cyr* makes clear, the district court lacked jurisdiction over the habeas corpus claims of those noncriminal aliens.[6]

In sum, the courts below properly exercised jurisdiction over Jama's habeas corpus petition, to the extent that he was seeking review of his final order of removal. In the absence of such review, he would be denied a judicial forum within which to challenge the INS's decision that he can be sent to Somalia

[6] The Ninth Circuit is not alone among the courts of appeals in its misreading of *St. Cyr*. *See, e.g., Liu v. INS*, 293 F.3d 36 (2d Cir. 2002) (habeas corpus review is available to non-criminal aliens, notwithstanding the fact that they have access to direct review); *Chmakov v. Blackman*, 266 F. 3d 210 (3d Cir. 2001) (same).

without the consent of that country, and there is no clear indication that Congress intended to deny all review. Nonetheless, even though none of the parties has raised the issue of jurisdiction, in light of the widespread confusion among the lower federal courts regarding the meaning of *St. Cyr*, *amici* suggest that the Court address the issue of jurisdiction in its opinion.

II. IMMIGRATION OFFICIALS MAY REMOVE JAMA TO SOMALIA UNDER § 1231(b)(2)(E) WITHOUT REGARD TO SOMALIA'S LACK OF A FUNCTIONING CENTRAL GOVERNMENT

Jama does not contest that he has been convicted of a crime involving moral turpitude and that he thereby is subject to removal. Nor does he contest the IJ's determinations that he is ineligible for withholding of removal and that he does not qualify for relief under the Convention Against Torture. Nor does he contend that removal to Somalia would violate any of his rights under the Constitution. Rather, his sole claim is that the federal government is not authorized under 8 U.S.C. § 1231(b)(2) to remove him to a country that lacks a functioning central government and thereby is unable either to accept his return or to withhold acceptance.

Jama's claim lacks any basis in the language of the statute. The government ordered that Jama be removed to Somalia based on 8 U.S.C. § 1231(b)(2)(E)(iv), which permits removal to "[t]he country in which the alien was born." Nothing in clause (iv) indicates that such removals are permissible *only* if the country agrees to accept the alien's return. Tellingly, the seventh of the seven clauses in § 1231(b)(2)(E) *does* include an

explicit acceptance requirement[7] -- thereby indicating that the other six clauses (which lack similar language) do *not* include an acceptance requirement. That omission is critical, for:

> Where Congress includes particular language in one section of [the Immigration and Naturalization Act] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

Jama argues that use of the word "another" in clause (vii) (". . . another country whose government will accept the alien into that country") suggests that the acceptance requirement of that clause should be read into the previous six clauses; *i.e.*, "that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts." Pet. Br. 24. That interpretation of the word "another" is highly implausible. A far more natural reading is to interpret the word "another" as referring simply to a country other than a country specified in clause (I) through clause (vi). Jama's interpretation requires an assumption that will often be false: that the government of each of the countries specified in clause (I) through clause (vi) will, in fact, accept the alien into its country.

The language of clause (vii) actually provides a very good reason why an acceptance requirement should *not* be read into

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[7] 8 U.S.C. § 1231(b)(2)(E)(vii) provides:

> If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, [the Attorney General shall remove the alien to] another country whose government will accept the alien into that country.

the prior six clauses. The government is directed to remove an alien to a country specified in clause (vii) *only* if it is "impracticable, inadvisable, or impossible to remove the alien to each country described" in clauses (I) through (vi). 8 U.S.C. § 1231(b)(2)(E)(vii). That language thus imposes specific limitations on the government's authority to remove an alien to a country described in clauses (I) through (vi): such removals are unauthorized if "impracticable, inadvisable, or impossible." Because Congress specifically enumerated three limitations on removal powers under clauses (I) through (vi), there is no reason to conclude that Congress intended other limitations that it did not state.

The prohibition against "impracticable, inadvisable, or impossible" removals serves to highlight a reality recognized by all parties to this litigation: as a practical matter, the government cannot remove someone to a country whose government is bound and determined not to accept the person. Thus, if the INS places an individual on a plane or ship bound for Country X, the government of Country X can frustrate the INS's removal efforts by placing the same individual on the plane or ship's return trip. In recognition of that reality, the federal government's general policy is *not* to attempt to remove an alien to a country that refuses to accept him. But that policy is not implicated in the case of a country without a functioning central government; in the absence of a government, there is unlikely to be anyone in that country in a position to prevent the alien's reentry.

Jama also argues that failing to read an acceptance requirement into clauses (I) through (vi) would "create an inconsistency in the statute." Pet. Br. 27. Jama asserts that 8 U.S.C. § 1231(b)(2)(D) prohibits removal to a country "of which the alien is a subject, national, or citizen" unless the government of that country consents to the removal. Yet, he

asserts, § 1231(b)(2)(D)'s acceptance requirement would be rendered "superfluous," thereby "violating a basic principle of statutory construction," if the federal government could remove the alien to his country of birth (which will often be the same country as the country of which he is a "subject, national, or citizen") under § 1231(b)(2)(E)(iv) without obtaining the country's consent. *Id.*

Jama's argument is deficient in at least two respects. First, it is not strictly correct that § 1231(b)(2)(D) includes an acceptance requirement. That provision states that if a removable alien is not removed to a country of his designation, then the alien "shall" be removed to a country of which he is a subject, national, or citizens. One of the exceptions to that mandatory requirement occurs when the government of the country "is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(D)(ii). But that exception is the converse of an acceptance requirement -- it applies *only* if there is a government in the country that expresses an unwillingness to accept the alien. If the government simply declines to respond to an acceptance request or if there is no government, it cannot be said that there is a government that "is not willing to accept the alien." Moreover, even if this exception somehow were found to be applicable to Jama's case, it would merely negate the mandatory nature of the government's removal obligation under § 1231(b)(2)(D); the statute is silent on the circumstances under which the Attorney General *may*, at his discretion, remove the alien to a objecting country.

Second, even if § 1231(b)(2)(D) were interpreted as Jama suggests, the statute would still not be rendered superfluous. The Attorney General may explore the possibility of removing an alien to one of the countries listed in § 1231(b)(2)(E) *only* if the alien is not removed pursuant to the procedures set forth in § 1231(b)(2)(D). While it is true that an alien might then be

removed (under § 1231(b)(2)(E)(iv)) to the country of his birth and that the country of birth may well be the same country of which the alien is a subject, national, or citizen and which previously expressed an unwillingness to accept the alien, the alien might also be removed to some other country specified in clauses (I), (ii), (iii), (v), or (vi). Under those circumstances, § 1231(b)(2)(D)'s supposed acceptance requirement would not be rendered a dead letter: only the foreign government's refusal to accept the alien would open up the possibility that the U.S. government could send the alien to one of the countries specified in clauses (I), (ii), (iii), (v), or (vi).

In sum, nothing in the language of § 1231(b)(2) supports Jama's contention that the federal government is statutorily prohibited from removing an alien to a country that lacks a functioning central government capable of signifying its acceptance of the alien.

A. Somalia's Dangerousness Does Not Provide Grounds for Prohibiting Jama's Removal to Somalia

Throughout his brief, Petitioner repeatedly makes note of the dangerous conditions that exist in Somalia. In light of those conditions, it is understandable why Jama might wish to remain in the United States.[8] Nonetheless, conditions in Somalia do not present a statutory impediment to Jama's removal to that country.

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[8] *Amici* note, however, that Jama's views on whether it is safe for him to go to Somalia have been inconsistent. For example, Jama proposed to the judge at his criminal trial that he would prefer immediate removal to Somalia to being sent to prison. J.A. 16. Only now, when he can foresee the possibility that he will be released into American society, has Jama become very concerned about safety conditions in Somalia.

Jama repeatedly asserts that one of Congress's purposes in enacting § 1231(b)(2) was to "ensure a safe transfer of the alien to the government of the receiving country." Pet. Br. 17. Jama provides no support for that assertion, and none is readily apparent. Indeed, Congress bent over backwards to ensure that § 1231 is not interpreted as a statute adopted for the benefit of removable aliens. For example, § 1231(h) states explicitly: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

The INS is not, of course, oblivious to Jama's personal safety. Under Article 3 of the Convention Against Torture, Jama would have been entitled to relief from removal if he could have demonstrated that he would be subject to torture if returned to Somalia. *See* 8 C.F.R. § 208.17. But after carefully reviewing the evidence, the IJ denied such relief because he determined that Jama failed to show that he would be subject to torture in Somalia. J.A. 23-25. Jama did not seek judicial review of that determination. Accordingly, Somalia's dangerousness has no bearing on Jama's right to avoid removal.[9]

[9] Both Jama and *amici* International Human Rights Organizations and International Law Professors assert that the dangerous conditions in Somalia also trigger U.S. obligations under the International Covenant on Civil and Political Rights ("Covenant"), Dec. 16, 1966, 993 U.N.T.S. 3, not to send aliens back to Somalia. But as the Court made clear just last month, the Covenant can provide no support for Jama's claims under United States law. "The United States ratified the Covenant on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2004 U.S. LEXIS 4763 at *74 (2004).

Jama notes that because of its dangerousness, Somalia "is included in a small group of countries for which Temporary Protected Status is available." Pet. Reply Mem. at 3 n.3. Those who apply for and receive Temporary Protected Status ("TPS") can avoid removal to their native country and can receive employment authorization for so long as the country continues to be designated under the TPS program. *See* 8 U.S.C. § 1254a; 68 Fed. Reg. 43,147 (July 21, 2003). But because Jama has been convicted of a felony, he is statutorily ineligible to receive protected status. 8 U.S.C. § 1254a(c)(2)(B).

Nor is Jama being singled out for particularly severe exposure to danger. There are eight countries currently designated under the TPS program, yet aliens are deported on a regular basis to all eight. Nor are felons the only group ineligible for protected status; citizens of designated countries generally are ineligible unless they have lived in this country for a significant period of time. For example, Somalians are not eligible unless they have lived in this country continuously since September 4, 2001. Moreover, given that Congress explicitly determined that convicted felons such as Jama are ineligible for protection under the TPS program, there is no reason to conclude that Congress intended that similar protections be read into § 1231(b) for the benefit of alien felons resisting removal efforts.

B. Nothing About the History of § 1231(b)(2) Suggests that Congress Ratified the Counter-Textual Interpretation Espoused by Jama

In its brief, the United States has explained at length why Congress and the Executive Branch should not be deemed to have ratified Jama's interpretation of § 1231(b)(2), an interpretation that runs counter to the plain meaning of the words used in the statute. *Amici* will not repeat all those

arguments here but rather will mention briefly a few major points.

First, Jama is incorrect in asserting that the case law on § 1231(b)(2) is well-settled and supports his position. In none of the cases cited by Jama was the court presented with the same fact pattern presented here: a country that can neither accept the alien's return nor withhold acceptance because it lacks a functioning central government. Moreover, in many of the cited cases, the court's statements regarding an acceptance requirement were pure dicta; they had nothing to do with the holdings of those cases. *See, e.g., Pelich v. INS,* 329 F.3d 1057 (9th Cir. 2003); *Amanulla v. Cobb,* 862 F.2d 362 (1st Cir. 1988); *Lee Wei Fang v. Kennedy,* 317 F.2d 180 (D.C. Cir. 1963).

Second, *Matter of Neisel,* 10 I. & N. Dec. 57 (BIA 1962), cannot be explained away by Jama. The most plausible reading of that decision is that the Board of Immigration Appeals determined that there is no acceptance requirement in the first six clauses of § 1231(b)(2)(E). While Jama attempts to impose on that decision a reading that is consistent with his position, an objective reader would be forced to conclude at the very least that the decision is susceptible of an interpretation that supports the government's position. In light of that conclusion, one cannot claim that Congress, when amending the immigration laws, would have concluded that the courts had arrived at a settled interpretation of the law.

When the lower courts are in disagreement over the interpretation of a statutory provision, it cannot be presumed that Congress -- merely because it failed to amend the provision while making other changes to the statute -- acquiesced in the statutory interpretation adopted by the majority of courts. *United States v. Powell,* 379 U.S. 48, 55 n.13 (1964). In any

event, arguments that Congress through inaction has acquiesced to the interpretation of court decisions, particularly decisions from lower courts, "'deserve[s] little weight in the interpretive process.'" *Alexander v. Sandoval,* 532 U.S. 275, 292 (2001) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)).

Finally, as the Department of Homeland Security and the Department of Justice cogently demonstrated in a July 19, 2004 Federal Register notice, it has never been the position of the Executive Branch that all the removal provisions of § 1231(b)(2) include acceptance requirements. *See* "Execution of Removal Orders; Countries to Which Aliens May Be Removed," 69 Fed Reg. 42,901 (July 19, 2004). The document provides notice of proposed DHS/DOJ regulations that would interpret § 1231(b)(2) in a manner consistent with the Eighth Circuit's decision in this case. *Id.* at 42,908. If and when the proposed regulations are adopted in final form, they will be entitled to substantial deference.

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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Date: July 22, 2004